

STATE OF NORTH CAROLINA
HERTFORD COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
09-EDC-2330

Student, by parent or guardian,)
Parent,)
Petitioners,)
v.)
HERTFORD COUNTY BOARD OF)
EDUCATION,)
Respondent.)

DECISION

THIS MATTER was heard before Administrative Law Judge, Beecher R. Gray, on June 30, 2009, in Winton, North Carolina. At the close of Petitioners' evidence, Respondent moved to dismiss under Rule 41(b) of the North Carolina Rules of Civil Procedure. After careful consideration of the sworn testimony of Petitioners, the exhibits offered and admitted into evidence by Petitioners, and the entire record in this proceeding, and after hearing arguments from Petitioner *Parent* and counsel for Respondent, the Undersigned is of the opinion that the above-captioned matter should be dismissed and hereby makes the following Findings of Fact and Conclusions of Law.

APPEARANCES

For Petitioners: *Parent, pro se*

For Respondent: Deborah R. Stagner
Eva B. DuBuisson
Tharrington Smith, LLP
209 Fayetteville Street
Post Office Box 1151
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WITNESSES

For Petitioners: *Student*, minor petitioner
Parent, petitioner

EXHIBITS

For Petitioners: Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 12A, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25

ISSUE FOR HEARING

By Order dated June 25, 2009, following a June 23, 2009 prehearing conference with both parties, the Undersigned granted Respondent's Motion in Limine, which *inter alia*, limited the issue for hearing to the following:

Whether Respondent failed to implement *Student's* current (2008-09) Individualized Education Program (IEP).

STANDARD OF REVIEW

The North Carolina Rules of Civil Procedure provide, in pertinent part:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff[.]

N.C. Gen. Stat. § 1A-1, Rule 41(b).

"When a motion to dismiss pursuant to 41(b) is made, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given to their testimony." *Dealers Specialties, Inc. v. Neighborhood Housing Servs, Inc.*, 305 N.C. 633, 640, 291 S.E.2d 137, 141 (1982). Moreover, in determining the sufficiency of the evidence when ruling on a motion to dismiss made under Rule 41(b), the judge is not bound to make inferences in favor of the plaintiff's (Petitioner's) evidence. *Id.* at 638, 291 S.E.2d at 140. Where the plaintiff's (Petitioner's) evidence shows no right to relief, the defendant (Respondent) is entitled to have its motion to dismiss granted. *Employers Mut. Cas. Co. v. Griffin*, 46 N.C. App. 826, 827, 266 S.E.2d 18, 19 (1980).

After weighing all the evidence and assessing the credibility and reliability of the witnesses, the Undersigned makes the following:

FINDINGS OF FACT

1. Minor Petitioner *Student* is a 14-year-old special education student enrolled in the Hertford County Public Schools. *Student* receives special education services as a child with Multiple Disabilities. During the 2008-09 school year, *Student* attended the seventh grade at ABC Middle School in a resource setting. He received instruction in academic subjects from special education teachers and joined his non-disabled peers for elective subjects.

2. Respondent Hertford County Board of Education is a local education agency (LEA) receiving funds under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, (IDEA) and was responsible for providing special education to *Student* under Article 9, Chapter 115C, of the North Carolina General Statutes.

3. Petitioner *Student*, by and through his parent, *Parent*, filed a contested case petition on April 2, 2009, alleging that the Hertford County Board of Education denied *Student* a free appropriate public education (FAPE) by failing to implement *Student*'s current IEP.
4. In both the Petition and in the Response to [Notice of] Insufficiency, Petitioner *Parent* asked that Respondent provide instruction at a level *Student* is "capable" of learning. Petitioner *Parent* also alleged that *Student*'s homebound instruction was inadequate and that he did not receive textbooks.
5. The IEP in effect for *Student* at the time of the filing of the Petition was written on April **, 2008, and amended on December **, 2008. The parties stipulated that the two documents marked as Petitioner's Exhibits 15 and 16, when taken together, constitute the IEP at issue in this matter.
6. At the time *Student*'s IEP was written, his present level of educational performance in reading was: "[*Student*]" can apply phonics to decode words and can read short passages and answer questions" at the third grade level. (Petitioner's Exhibits 15 and 16).
7. At the time *Student*'s IEP was written, his present level of educational performance in math was: "[*Student*]" can compute up to three digit numbers with the calculator and has emerging skills in regrouping. [*Student*] can tell time to the quarter hour and can compute coins in isolation but not in combination." (Petitioner's Exhibits 15 and 16).
8. Petitioner *Parent* did not dispute *Student*'s present levels of educational performance at the time the IEP was written.
9. The IEP accurately reflects *Student*'s present levels of educational performance in April 2008.
10. *Student*'s IEP contained the following annual goal for reading: "[*Student*]" will apply strategies and skills to comprehend text that is heard, read and viewed." (Petitioner's Exhibits 15 and 16).
11. *Student*'s annual goal for math focused on his learning math calculation, regrouping, telling time, and counting money. (Petitioner's Exhibits 15 and 16). His benchmark goals included learning multiplication tables, solving word problems, and regrouping in subtraction.
12. The IEP contains academic goals only in the areas of reading and math.
13. Petitioner *Parent* removed *Student* from school beginning October 20, 2008. Petitioner requested that *Student* be provided homebound services in November 2008. There was no medical reason for *Student* to remain out of school. (T. pp. 152-53, 156).
14. At Petitioner's request, the IEP team changed *Student*'s placement to homebound on December 8, 2008.
15. The IEP is silent as to the number of hours of direct instruction *Student* would receive while on homebound placement.

16. Respondent provided *Student* approximately five hours per week of direct instruction at home with a special education teacher from December 2008 through May 2009. *Student* received instruction in math, reading, and science during this period. (Petitioner's Exhibit 17).
17. During the period *Student* was receiving homebound instruction, *Student's* teachers at ABC Middle School provided workbooks and instructional materials in reading, math, and science to be used by the homebound teacher. (Petitioner's Exhibits 11, 22 – 25).
18. The instructional materials and assignments provided by *Student's* teachers were consistent with *Student's* annual and benchmark goals in reading and math. The instructional materials covered areas including, but not limited to, reading comprehension, story elements, subtraction with regrouping, counting coins, multiplication, and time. (Petitioner's Exhibits 8, 9, 22- 25).
19. *Student* was called as a witness by *Parent*. He did not recognize the examples of school work or the progress reports that Petitioner *Parent* showed to him, and he did not recall doing some of the work he was asked about.
20. Petitioner *Parent* testified that *Student* is not capable of doing the work provided by Respondent. (T. p. 140). On at least one occasion, Petitioner *Parent* returned uncompleted work to the school with a handwritten notation indicating that the work was too difficult for the student. (Petitioner's Exhibit 9).
21. On occasion, Petitioner *Parent* substituted workbooks purchased from the Dollar Tree store and Wal-Mart and homemade worksheets consisting of single-digit subtraction for the instructional materials provided by *Student's* teachers. (T. pp. 146, 151-152).
22. Petitioner *Parent* does not hold any teaching certification and does not have a degree in education. (T. p. 120).
23. An independent educational evaluation of *Student* was conducted by E.H., M.A., L.P.A. E.H.'s report indicates that *Student's* ability is "in the lower end of the mild range of mental retardation." (Petitioner's Exhibit 12).
24. E.H. is not a school psychologist. (Petitioner's Exhibit 12A, pp. 16, 28). Although E.H. reviewed *Student's* IEP and a prior psychological report, he did not review any homework, grades, or other school records for *Student*. (Ex. 12A, pp. 14, 26-27). He did not observe *Student* in a school setting. (Ex. 12A, p. 26).
25. E.H. had no opinion about *Student's* educational program. (Petitioner's Exhibit 12A, p. 26). He did express the opinion that *Student* had the ability to learn and was capable of learning. (Ex. 12A, pp. 33-34).
26. Under the provisions of the IEP, *Student* was eligible for extended school year (ESY) services. Respondent offered *Student* ESY services for the summer of 2008. (T. p. 124).
27. Petitioner *Parent* elected not to send *Student* to the summer school program offered by Respondent. (T. p. 125).

28. *Student's* IEP provided that he would be assessed using an alternate assessment rather than the State End-of-Grade (EOG) test. The alternate assessment to be used was the NCEXTEND 1. *Student* had taken the NCEXTEND 1 in past years.

29. Petitioner *Parent* did not allow *Student* to take the NCEXTEND 1 exam that was scheduled for June 1 and 3, 2009, because she claimed she had not received documentation of prior testing. (T. p. 123).

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction in this contested case under Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300.

2. Respondent is required under federal and state law to make special education and related services available to *Student* and to offer him a free appropriate public education (FAPE).

3. Under IDEA, the burden of proof in an administrative hearing is placed on the party seeking relief. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this instance, Petitioner is the party seeking relief and therefore bears the burden of proof.

4. A FAPE must provide a student with “meaningful access to the educational process. That is, a FAPE must be reasonably calculated to confer some educational benefit on a disabled child.” *M.M. v. Sch. Dist. of Greenville County*, 303 F.3d 523, 526 (4th Cir. 2002) (internal citations omitted).

5. A parent may be denied equitable relief by his or her unreasonable actions that reduce a school district’s ability to provide a FAPE. See *Richmond County Sch. Dist.*, 52 IDELR 55 (Ga. SEA 2009) (holding that the petitioner was not entitled to compensatory education for the period she unreasonably kept her son out of school because her failure to cooperate with the district prevented the student from accessing his education). In this case, Petitioner *Parent* actively obstructed efforts of school personnel to provide an appropriate education for *Student*, for example, by keeping him out of school for more than a month without a valid medical reason; by substituting instructional materials that she believed were more appropriate than the work provided by Respondent; by rejecting ESY services offered to *Student* in the summer of 2008; and by refusing to allow him to take the NC EXTEND 1 assessment in June 2009.

6. In order to prevail on a claim under the IDEA challenging the implementation of an IEP, a parent must show more than a *de minimis* failure to implement all elements of the IEP – there must be evidence that there was a material failure to implement an essential element of the IEP, one that was necessary for the child to receive an educational benefit. *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 821 (9th Cir. 2007); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). See also *Burke v. Amherst Sch. Dist.*, 2008 WL 5382270 (D. N.H. 2008) (unpublished) (“[E]ven a demonstrated IEP implementation failure, without more, does not constitute a *per se* denial of a FAPE or a *per se* violation of the IDEA.”).

7. Petitioner has failed to establish that the IEP was not implemented based on an allegation that the work provided to *Student* was too difficult. *Parent* relied solely on her own opinions and observations, and the testimony of *Student*, to support her contention that *Student*

was not capable of understanding or doing the school work provided by Respondent. *Parent* presented no evidence that she possesses the educational qualifications or credentials to accurately assess *Student's* abilities or performance. Apart from her subjective opinions, *Parent* presented no evidence that the instructional materials and assignments provided by Respondent were not appropriate for *Student*. See *Mr. G. and Ms. K. v. Timberlane Regional Sch. Dist.*, 47 IDELR 5, 2007 WL 54819 (D. N.H. 2007) (unpublished) (holding that parent's opinions about student's performance were insufficient to establish denial of a FAPE).

8. Petitioner *Parent* also has failed to establish that the IEP was not implemented based on the allegation that *Student* was not provided with an adequate number of hours of homebound instruction. The IEP is silent as to the quantity of homebound instruction. Petitioner presented no evidence that *Student* was entitled to more homebound instruction than he received or that he required additional instruction to attain some educational benefit. Without evidence of record, the Undersigned cannot determine that Respondent's provision of approximately five hours per week of direct instruction by a special education teacher was not a substantial implementation of the IEP. See *Berkshire Hills Regional Sch. Dist.*, 38 IDELR 282 (Mass. SEA 2003) (holding that parent did not establish failure to comply with IEP where language of IEP was ambiguous and no additional evidence established what IEP required).

9. The evidence does not establish that Respondent failed to provide *Student* with appropriate books or other instructional materials.

10. Petitioner has not sustained her burden of proof that *Student* was denied a FAPE.

Based on the foregoing Findings of Fact and Conclusions of Law, it hereby is ORDERED that all of Petitioner's claims are dismissed with prejudice.

NOTICE

In order to appeal this Decision, the person seeking review must file a written notice of appeal with the North Carolina Superintendent of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Decision. G.S. 115C-116(h) and (i).

This the 16th day of July 2009.

Beecher R. Gray
Administrative Law Judge